

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Misuse of Internet Protocol (IP) Captioned Telephone Service)	CG Docket No. 13-24
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Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities)	CG Docket No. 03-123
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**COMMENTS OF CAPTIONCALL, LLC ON HAMILTON RELAY, INC.’S
PETITION FOR RECONSIDERATION**

CaptionCall, LLC (“CaptionCall”) submits these comments in support of Hamilton Relay, Inc.’s (“Hamilton’s”) Petition for Reconsideration (the “Petition”)¹ regarding the Federal Communications Commission’s (“Commission’s”) standard for recovery of exogenous costs associated with the new obligations for IP CTS providers to integrate their users into the Telecommunications Relay Services User Registration Database (“URD” or the “Database”).

In the *URD Order*, the Commission expanded the Database, which was created for the Video Relay Services program, to encompass IP CTS.² As a result, IP CTS providers will be required to submit registration information about their users to the Database³ and to obtain consents from their users prior to the submission of such information.⁴ The Commission

¹ Petition for Reconsideration, CG Docket Nos. 13-24, 03-123 (Apr. 8, 2019) (“*Hamilton PFR*”).

² See *In re Misuse of Internet Protocol (IP) Captioned Telephone Service*, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 691, 696 ¶ 13 (2019) (“*URD Order*”).

³ *Id.* According to the *URD Order*, once the rules are effective and the Database is ready to accept IP CTS users, the Commission will release a public notice, initiating a one-year data submission period for uploading registration information on all current IP CTS users. *Id.* at 699 ¶ 17.

⁴ *Id.* at 700-01 ¶ 20.

recognized that these obligations would entail costs for IP CTS providers, and authorized the recovery of such exogenous costs under a three-part test: Costs may be recovered if they (1) belong to allowable cost categories; (2) are new costs not factored into the interim rates for IP CTS; and (3) if unrecovered, may cause a provider's current allowable expenses plus operating margin to exceed its revenues.⁵ Hamilton's Petition requests that the Commission "rescind" this test.⁶ CaptionCall supports Hamilton's request and urges the Commission to grant the Petition to cure violations of the Administrative Procedure Act ("APA") and to avoid causing disruption to the IP CTS market.

There is no question that compliance with the *URD Order* will involve additional costs for all IP CTS providers.⁷ As Hamilton explains, these costs will likely be "substantial" and "sudden."⁸ The Commission's expectation that URD compliance costs will be "limited"⁹ lacks support in the record.¹⁰ Indeed, in the *URD Order*, the Commission acknowledged both that it was imposing new costs on IP CTS providers—at least \$10+ million in upfront costs and \$3+ million in annual costs per provider¹¹—and that these costs "were not considered when the interim

⁵ *Id.* at 703-04 ¶ 26.

⁶ *Hamilton PFR* at 1-2.

⁷ While the Commission, InnoCaption, and ClearCaptions suggest that these costs will be more burdensome for smaller providers, *see URD Order*, 34 FCC Rcd at 703-04 ¶ 26; Letter from Cristina O. Duarte, Director of Regulatory Affairs, MezmoCorp (dba InnoCaption) to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, at 1 (Feb. 7, 2019) ("*InnoCaption 2-7-19 Ex Parte*"); Tamar E. Finn, Counsel to ClearCaptions, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, at 2 (Feb. 8, 2019) ("*ClearCaptions 2-8-19 Ex Parte*"), they have not offered any reason for so assuming. Indeed, the *only* cost driver that the Commission considered in the *URD Order* is the per-user (*i.e.*, variable) cost of obtaining consents for URD data submissions, which will be higher for larger providers. *See URD Order*, 34 FCC Rcd at 703 ¶ 25 & nn.74-75.

⁸ *See Hamilton PFR* at 7-8; *accord* Letter from Dixie Ziegler, Bruce Peterson, Scott Freiermuth, and Cristina Duarte to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, at 3 (Feb. 28, 2019) ("*Joint Provider Request*"); Letter from Rebekah P. Goodheart, Counsel to CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, at 6 (Feb. 7, 2019) ("*CaptionCall 2-7-19 Ex Parte*").

⁹ *See URD Order*, 34 FCC Rcd at 702 ¶ 23.

¹⁰ *CaptionCall 2-7-19 Ex Parte* at 5-6.

¹¹ *See URD Order*, 34 FCC Rcd at 703 ¶ 25.

IP CTS compensation rates were determined.”¹² As Hamilton explained in its Petition, the Commission’s *ex post* patch to allow recovery of these new costs as exogenous is procedurally and substantively flawed and “should [be] reconsider[ed] and rescind[ed].”¹³

Under the first prong of the exogenous-cost recovery test, costs associated with integrating IP CTS into the Database are recoverable only if they belong to an allowable cost category.¹⁴ This circular requirement fails to satisfy the APA.

First, as Hamilton explains, the Commission “has never established what costs are allowed or disallowed for IP CTS ratemaking purposes.”¹⁵ IP CTS rates have been set based on the Multistate Average Rate Structure (“MARS”) methodology—which did not consider providers’ costs or the categories into which those costs fall.¹⁶ Although IP CTS providers submitted their cost data to the TRS Fund Administrator, the Administrator’s cost categories were incomplete and arbitrary,¹⁷ were not intended for rate-setting purposes,¹⁸ were not subject to notice and comment,¹⁹ and were never adopted for IP CTS by the Commission.²⁰ The Commission’s *2018 Rate Order* also did not adopt recoverable cost categories for IP CTS; instead, the interim rates

¹² See *id.* at 703-04 ¶ 26.

¹³ *Hamilton PFR* at 1; see also 47 C.F.R. § 1.429.

¹⁴ *URD Order*, 34 FCC Rcd at 703-04 ¶ 26.

¹⁵ *Hamilton PFR* at 3.

¹⁶ See *In re Misuse of Internet Protocol (IP) Captioned Telephone Service*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 33 FCC Rcd 5800, 5807-09 ¶¶ 15-16 (2018) (“*2018 Rate Order*”) (describing MARS methodology).

¹⁷ See *Joint Provider Request* at 2-3; Reply Comments of CaptionCall, LLC, CG Docket Nos. 13-24, 03-123, at 19-20 (Oct. 16, 2018).

¹⁸ See Letter from Rebekah P. Goodheart, Counsel to CaptionCall, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, at 1-2 (May 29, 2018).

¹⁹ See *Hamilton PFR* at 2-3.

²⁰ *2018 Rate Order*, 33 FCC Rcd at 5819 ¶ 33 (describing that TRS Fund Administrator based its cost category requests for IP CTS providers on the categories of costs “that generally have been deemed allowable in calculating rates for other forms of TRS”).

were set by applying a 10 percent reduction year-over-year for two years to establish a “glide path” for the market.²¹ Indeed, the *2018 Rate Order* included a further notice of proposed rulemaking that sought comment on which costs should be considered recoverable.²²

Second, the requirement that costs are recoverable as exogenous only if they belong to an allowable cost category is either superfluous or fails to reflect reasoned decision making when applied to a single category of costs—*i.e.*, URD integration costs. If this cost “category” is recoverable, as the *URD Order* appears to hold, then it is, by definition, recoverable on a *categorical* basis. If this cost category is not recoverable, then it does not actually afford the relief that the *URD Order* admits is necessary because integration costs “were not considered when the interim IP CTS compensation rates were determined.”²³ Thus, the first prong of the exogenous-cost recovery test either (1) serves no purpose, because the category of URD integration costs is recoverable for all providers;²⁴ or (2) opens the door to denying all providers relief that the Commission has already recognized is necessary.²⁵ This result is not consistent with the APA.

The *URD Order* further limits recovery of URD integration costs to those costs that “if unrecovered[,] may cause a provider’s current allowable-expenses-plus-operating margin to

²¹ *2018 Rate Order*, 33 FCC Rcd at 5813-16 ¶¶ 23-26.

²² *See id.* at 5837-41 ¶¶ 71-80. In the *2018 Rate Order*, the Commission recognized that it could not and should not adopt allowable cost categories for IP CTS without engaging in a full rulemaking as required by the APA. *See id.* at 5815-16 ¶ 25 (describing that adoption of interim rates reflected recognition that “there are a number of issues concerning compensation rates for IP CTS [that] must yet be resolved, as addressed in the *Further Notice*” including “the appropriateness of some categories of allowable costs for this service”). Yet that is precisely what the *URD Order* effectively does for the recovery of exogenous costs.

²³ *URD Order*, 34 FCC Rcd at 703-04 ¶ 26.

²⁴ *Cf. Potthast v. Metro-N. R.R. Co.*, 400 F.3d 143, 150 (2d Cir. 2005) (declining to adopt reasoning that would “render superfluous essential components” of a “three-pronged . . . test” and holding that each prong must have “value” and “independent meaning”).

²⁵ An agency is entitled to depart from prior precedent and change course, but it must provide a reasoned analysis for doing so. *See, e.g., Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003).

exceed its IP CTS revenues.”²⁶ The record confirms that this third prong of the exogenous-cost recovery test is unlawful and bad policy.

First, this prong, too, relies on a distinction between recoverable and non-recoverable costs, and suffers from the same APA shortcomings discussed above.

Second, this requirement may force providers to sacrifice service quality and innovation. Even a provider that becomes “underwater” as a result of URD integration costs is not guaranteed to recover those costs; instead, it first has to convince the TRS Fund Administrator and/or the Commission that it is underwater for the year.²⁷ The inherent uncertainty of such recovery risks significant harm to the IP CTS market. Rather than run the risk of running losses and then being denied recovery, a rational provider would cut other costs, likely “harming service quality” or “halt[ing] investment” in service improvements or efficiency-maximizing innovations.²⁸

Third, this requirement will create unnecessary administrative costs for providers, the TRS Fund Administrator, and the Commission. The *URD Order* describes that providers seeking compensation for integration costs “must submit to the TRS Fund administrator a reasonably detailed explanation of those costs incurred.”²⁹ The TRS Fund Administrator and the Commission are both entitled to review such costs, to request additional supporting documentation, and to disallow unreasonable costs.³⁰ As Professor Michelle Connolly has explained, this process will

²⁶ *URD Order*, 34 FCC Rcd at 703-04 ¶ 26.

²⁷ *Id.* at 704 ¶ 26 n.82. Moreover, in creating the exogenous cost test, the Commission inexplicably departs from its longstanding practice of setting uniform IP CTS rates for all providers. Although the Commission sought comment on a variety of options for a permanent rate methodology, including tiered rates, a price cap, and auctions, the proceeding remains pending. The Commission has not explained how departing from a uniform rate for IP CTS would be economically rational and efficient. Nor has the Commission explained why a departure from a uniform compensation rate is justified for URD implementation costs; the failure to provide such an explanation of a change in approach violates the APA. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

²⁸ *Hamilton PFR* at 7; *see also Joint Provider Request* at 3-4 & n.12.

²⁹ *URD Order*, 34 FCC Rcd at 704 ¶ 26 n.82.

³⁰ *Id.*

result in wasteful administrative expenditures that could be easily avoided.³¹

Finally, if IP CTS providers are forced to forego investments in service quality and innovation, the harmful effects will be borne by individuals with disabilities, which is in tension with the Americans with Disabilities Act.³²

In addition to acting on Hamilton’s instant Petition, CaptionCall urges the Commission to grant Sprint’s Petition for Reconsideration on the 2019-2020 Fund Year interim rate, which remains pending before the Commission.³³ Revisiting the \$1.58 interim rate has broad support in the record,³⁴ and the Commission should expeditiously grant this aspect of Sprint’s Petition for Reconsideration.

Respectfully submitted,

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³¹ Comments of CaptionCall, LLC, CG Docket Nos. 13-24, 03-123, App. C, Michelle Connolly, *An Economic Analysis of Internet Protocol Captioned Telephone Service Policy Reform* 8-9 ¶¶ 17-20 (Sept. 17, 2018).

³² See The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 401, 104 Stat. 327, 366-69 (codified at 47 U.S.C. § 225).

³³ See Petition for Reconsideration, CG Docket Nos. 13-24, 03-123 (July 27, 2018); *accord* Reply Comments of Sprint Corp., CG Docket Nos. 03-123, 10-51, at 5-7 (June 7, 2019).

³⁴ See, e.g., Letter from Mary Beth O’Hara Osborne, Chief Operating Officer, Rolka Loube to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123, Att. Letter from iTRS Advisory Council (Apr. 23, 2019); Letter from David W. Rolka, Administrator, Rolka Loube to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123, 13-24 (Dec. 4, 2018); Letter from Blake Reid, Counsel for Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI) et al., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 03-123 (Mar. 19, 2019); *Joint Provider Request*.